IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.118 OF 1994

Balu @ Viddhyasagar Yashavant
Khairmode Appellant
(Org.Accd.No.2)

Vs.

The State of Maharashtra Respondent

Mr.S.P.Thorat for appellant.
Ms.V.R.Bhosale, APP for State.

CORAM: S.S.PARKAR & S.R.SATHE,JJ.

September 07, 2004.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. This appeal is filed impugning the judgment and order dated 22/12/1993 delivered by the 2nd Addl. Sessions Judge, Satara convicting the appellant-original accused no.2 for offence under section 302 of IPC and sentencing him to life imprisonment and to pay a fine of Rs.2000/- in default to suffer R.I. for one month in Sessions Case No.50 of 1989.

2. The prosecution case briefly stated is as follows:

The incident of assault had taken place on 24/10/1988 in the afternoon in the agricultural land

of Kundalika Khairmode in village Vikhale, Tal.Khatav in Dist. Satara when deceased Malan was assaulted with sickle on her neck by the appellant. The appellant-accused is the nephew of the deceased Malan as she was the wife of brother of his father Yashwant Khairmode who was originally arraigned as accused no.1. Accused no.1 and his brothers were cultivating their lands separately. The family of the deceased were residing in Bombay and, therefore, even their land was cultivated by accused no.1. At the time of the incident the deceased was getting their land cultivated from some other person by name Vivek Khairmode. On the date of the incident initially there was quarrel between Kalabai, the mother of the appellant and deceased Malan as, according to the prosecution case, Kalabai had cut bajara crop from the land of the complainant. After the said quarrel Malan wanted to go to village sarpanch to complain about the same. Thereafter quarrel took place between the father of the appellant, who was original accused no.1, and Malan. Seeing the quarrel the appellant went running and assaulted Malan with sickle on her neck and head as a result of which Malan fell down. The police were informed about the incident and complaint of PW 3 Rajesh was lodged

against both the accused. Police came in search of the accused persons. Accused no.1 was arrested with blood stained sickle in his hand when he was sitting near bajara crop. Accused no.2 i.e. the appellant was traced near the river. On 25/10/1988 the spot panchanama was drawn. The clothes of the accused also were seized. The dead body was sent for post-mortem examination. The clothes of the deceased, accused persons and the sickle found from the possession of accused no.1 were sent to CA for examination. The police had also recorded the statements of other witnesses on the following day of the incident. After the investigation was over the charge-sheet came to be filed and the case was committed to the Sessions Court, Satara.

3. Before the Sessions Court charge was framed for offence under Section 302 read with section 34 of IPC on 10/8/93 to which both the accused pleaded not guilty. On behalf of the prosecution eight witnesses were examined. PW 1 is Balkrishna Deshmukh who had acted as panch for production of sickle which was seized from accused no.1. PW 2 is Shrirang Ghadge who was panch for the spot panchanama. PW 3 Rajesh Khairmode is the son of the deceased who had lodged

the complaint. He was also eye witness to the incident. PW 4 Sharda Khairmode is another eye witness to the incident. PW 5 is Dr.Madne who performed autopsy on the dead body of Malan. PW 6 is Bhimrao Deshmukh, Police Patil of the village. PW 7 is Govind Pisal, Police Constable who had traced accused no.1 from the field of bajara crop on the date of the incident. PW 8 is Shivaji Deshmukh, API who investigated the case. On behalf of the defence Dr.Khade was examined to prove the certificate of injury (Exh.36) issued in respect of the two injuries suffered by accused no.1 on his hand. The defence of the accused was of right of private defence of person and property and also about the sudden provocation.

4. After considering the entire evidence on record the trial Court acquitted original accused no.1, father of the appellant and convicted the appellant for offence under section 302 of IPC and sentenced him to undergo life imprisonment and to pay a fine of Rs.2000/- in default R.I. for one month. Aggrieved by the said order of conviction and sentence recorded against him, this appeal is preferred by the appellant-original accused no.2.

5. With the assistance of the learned defence Advocate we have gone through the evidence on record. Mr.Thorat appearing for the appellant-accused firstly contended that the witnesses are relations of the deceased and, therefore, reliance must not be placed on their evidence. Secondly he contended that the appellant had a right of private defence both of the person of his father who was assaulted by deceased Malan with a sickle on his hand and also the right of private defence of property as there was dispute about the bajara crop which was raised on the land of the accused. Lastly he contended that the appellant was a young boy hardly of 16 years at the time of commission of the offence and, therefore, lenient view may be taken while imposing the sentence on him.

6. As regards the incident in question there is evidence of PW 3 Rajesh Khairmode who was 16 years of age when he gave evidence in the court. He is the son of the deceased and was working in the adjoining field at the time of the incident. He has deposed that at about 3 p.m. Kalabai i.e. mother of the appellant-accused no.2, who was his aunt, went to deceased Malan and questioned her why she was cutting bajara crop and she would not allow his mother to cut

bajara crop from the complainant's land. His mother told her that she would report about it to the Sarpanch of the village. Malan also asked Kalabai why she was cutting bajara crop from the land given to them in the partition. There was, therefore, quarrel between Kalabai and Malan. At that time accused no.1 went near his mother in the land of Kundalik and then there was quarrel between his mother i.e. Malan and accused no.1 on account of bajara crop. When the quarrel was going on accused no.2 who was at that time in the land of one Tayappa Khairmode came there running with a sickle in his hand and assaulted Malan on the hand, shoulder and on her head. As a result of the said assault his mother fell on the ground and thereafter both the accused ran away. After hearing about the incident Police Patil came there. He then went to search accused no.2 and caught him. Thereafter the witness went to the police station and lodged his complaint which is Exhibit 21. His evidence is corroborated by the complaint (Exh.21) lodged by him. His evidence is also supported by PW 4 sharda Khairmode. Her land is near the land of accused and the deceased. She was working as a labourer in the village. She has deposed about the quarrel which took place between

Malanbai and accused no.1. When Malanbai started going to Sarpanch, accused no.1 followed her and both of them were quarrelling. Thereafter she saw accused no.2 coming there with a sickle in his hand and he assaulted Malanbai on her shoulder with a sickle as a result of which she fell down. The evidence of this witness has not been shaken in the cross-examiantion as regards the quarrel which took place between accused no.1 and Malan for bajara crop and assault made by accused no.2 with sickle on the shoulder of Malanbai. Their evidence is also corroborated by the medical evidence.

7. According to Medical Officer Dr.Madne who was examined as PW 5 Malan had received two injuries on her person which as per the post-mortem report are as follows:

> (1) Incised wound (right shoulder) claricular region 6 inch x 1 1/2 inch breadth. 2 Inch depth. Extending from shoulder jt. to nape of neck obliquely. Cutting claricle completely in lateral in depth cutting subclarian 1/3 Artery subclarian vein and neural bundles and muscles of should region. Pectoralis/major-minor trabazine and neck muscles.
>
> (2) Incised wound over scalp. Lateral

	to midline and parietal region 1 1/2 inch x 0.5 cm.m. skull bone fracture visible through wound verticle.			

According to the Medical Officer the injury on the shoulder had cut clavical bone in the lateral third because of which arteries, veins and nerve bundles were found cut. Because of the second injury found on the scalp i.e. on left parietal region the doctor had noticed fracture of skull bone. Thus as per the Medical Officer the deceased had received two injures, one cut injury on the neck and the other injury on the scalp which resulted in the fracture of skull bone. Those injuries were caused by sharp and cutting object. As per the doctor the injuries were ante mortem and the cause of death was haemorrhagic shock due to incised wound over right shoulder region and skull. In the cross-examination the Medical Officer has denied that injury no.2 was possible by falling on the heap of bajara stack (sad). He has also denied that falling on such heap of bajara stack (sad) could cause the fracture of the skull. He has also denied that injury no.2 which resulted in the fracture of skull was possible by falling on sharp edged stone. The aforesaid medical evidence leaves no doubt that the deceased must have received the

injuries due to the assault on her with sickle as per the evidence of the eye witnesses.

8. There is also evidence led by the prosecution that accused no.1 was traced while he was hiding near the bajri crops and was found with a sickle with him which was seized under the panchanama. That sickle was blood stained and sent to CA for examination along with the clothes of the accused and the deceased. As per the CA report dated 31st January 1989 the said sickle was found stained with blood of group "O" which was also found on the clothes of the deceased.

9. Secondly, at the time of arrest the clothes of accused nos.1 and 2 were also seized under panchanama. They were also blood stained and were sent to the CA for examination. As per the CA report the clothes of accused no.1 as well as accused no.2 were found stained with blood of group "O" which was also blood group found on the clothes of the deceased and the sickle. The clothes of accused no.2 i.e. the appellant were T-shirt and half pant. No doubt the blood of both the accused was sent for examination and their blood group was also "O",

however no injury was found on the person of the accused no.2 yet his clothes were stained with blood of group "O". This circumstance also corroborates the evidence of eye witnesses. As stated earlier the complaint was lodged immediately same evening by PW 3, the son of the deceased who was probably not even in his teens at that time.

10. The aforesaid evidence leaves no doubt about the involvement of accused no.2 in the crime in question. The evidence of the complainant, eye witness corroborated by his immediate complaint lodged with the police and the evidence of PW 4 Sharda, another eye witness, prove that it was the appellant who had assaulted the deceased with a sickle on her shoulder and head. The injuries suffered on the vital parts of the body with a sharp edged weapon go to show the intention of the appellant to commit murder. In any event the appellant had assaulted the deceased with the intention of causing such bodily injury which was likely to result in the death of Malanbai.

11. However, on behalf of the defence the plea is raised that the accused no.2 had assasulted the deceased in exercise of his right of private defence

of property and person. As regards the right of private defence in respect of the property is concerned, the same is out of question because according to the prosecution case the deceased wanted to remove the crops from her own land and not from the land of the accused. Secondly when there was a quarrel with accused no.1 with regard to bajri crop grown on the complainant's land, Malanbai wanted to go and lodge a complaint about the same with the Sarpanch of the village. Therefore, there was no question of exercise of right of private defence of property.

12. As regards the right of private defence of person of accused no.1 is concerned, the defence has led the evidence of defence witness Dr.Kumar Khade, the Medical Officer of Primary Health Centre, Waduj. It is not in dispute that the police had sent accused no.1 to the Medical Officer for examining the injuries which were found on the hand of accused no.1 at the time of his arrest. Panch PW 1 Balkrishna Deshmukh has deposed that the hand of the accused was injured with sickle. The injury on his finger is also mentioned in the panchanama of his arrest (Exh.17). As per the defence witness Dr.Khade

accused no.1 was examined by him on 25/10/1988 at about 10-45 a.m. The history given to him was that he was assaulted with a sickle on 24/10/1988 at about 5.30 p.m. On the examination of accused no.1 P.W.5 found following two injuries:

> (1) One incised wound on right little finger upper 1/3 transer verse size 3/4 x 1/4 x 1/8 inch palmer side. Blood clotted and was not easily removable.
>
> (2) Incised wound on right ring finger upper 1/3 on palmer side. Size 1 inch x 1/4 x 1/8 inch. Blood clotted.

According to the said witness the cause of injury was due to hard and sharp instrument and the age of injury was within 24 hours. Both the injuries were in the same line and of same nature and of same age. He has deposed that those injuries were possible if a person raised his hand to protect attack of sickle. No doubt he has also stated in the cross-examination that those injuries could be self-inflicted and were possible while removing sickle from the injured person's hand. However, normally self inflicted injury will not be on the right hand.

13. In the cross-examination of PW 4, the eye witness, it was put to the witness that Malan gave stroke of sickle on the hand of accused no.1 and he

got injured though it is denied by the witness. The witness has also denied that Malan raised sickle on accused no.1. Both the accused have stated in their 313 statement that there was quarrel between Kalabai i.e. mother of the appellant and Malan on account of cutting bajara crop. Accused no.1 asked Malan not to go to Sarpanch in respect of the domestic quarrel. She had sickle with her and she assaulted accused no.1 with sickle. The appellant in answer to question no.14 has stated in his 313 statement that when Malan was assaulting accused no.1, he tried to push her and while doing so the sickle came in contact with her shoulder and she was injured on her head because of the fall on the stone and 'sad' of bajara. In answer to question no.27 the appellant has stated that quarrel was going on between the mother of the complainant Malan and accused no.1. The hand of accused no.1 was cut by sickle of Malan. So he went there and pushed Malan with sickle in his hand because of which she got injured on her shoulder.

14. From the aforesaid defence case, it appears that the quarrel had taken place with regard to the bajara crop between deceased Malan and accused no.1. As per

the prosecution case also Malan wanted to go and complain to sarpanch about the said dispute and accused no.1 did not want her to go to Sarpanch. It seems accused no.1 wanted to prevent Malan from going to Sarpanch. The cut injuries received on the hand of accused no.1 were, as per the Medical Officer, possible due to assault with a weapon like sickle. The said injuries are not explained by the prosecution. Surprisingly though accused no.1 was sent with police letter for medical examination of his injuries, the prosecution had not examined the doctor about the injuries found on the hand of accused no.1 and, therefore, the defence had to examine the doctor as a defence witness. In all probability when the accused no.1 wanted to prevent Malan from going to Sarpanch to lodge complaint about the dispute of bajari crop, Malan might have tried to use sickle because the bajri of complainant was removed by Kalabai i.e. wife of accused no.1 as a result of which there was quarrel between Kalabai, wife of accused no.1 and Malan initially and thereafter Malan and accused no.1. Either because of quarrel and/or injury received by accused no.1 on his hand the appellant, being the son of accused no.1, seems to have become infuriated and, therefore, went

running to the place where the quarrel was going on and assaulted deceased Malan with sickle in his hand. There was no premeditation and the incident seems to have taken place on the spur of the moment. The appellant was young boy stated to be barely 16 years old who seems to have been suddenly provoked because of his young blood and, therefore, must have assaulted the deceased with sickle in his hand. He was working in the adjoining land and, therefore, was likely to have sickle with him which seems to have been used by him against Malan seeing the quarrel between her and his father and also the injury which was received by accused no.1 on his hand. It is difficult to believe that accused no.1, aged 55 years who was hiding himself after the incident behind bajri crop due to the fear that he might be assaulted by villagers due to the fatal injury sustained by Malan at the hands of his son i.e. appellant, would have thought of self inflicting injuries on his hand. If that be so, he would have inflicted injuries on his left hand and not on right hand.

15. The accused does not have to prove his defence beyond reasonable doubt but only by preponderance of probabilities. The defence raised by the accused

appears to be probable. From the evidence of the eye witnesses itself it appears that there was quarrel between accused no.1 and Malan and hearing the quarrel accused no.2 went there running and assaulted Malan. The offence committed by the appellant would fall under Exception 1 of Section 300 as the appellant seems to have been deprived of the power of self control by grave and sudden provocation because of which he assaulted Malanbai resulting in her death. He also seems to have acted without premeditation upon a sudden quarrel. The appellant being a young boy seems to have lost self control due to the provocation caused by the quarrel and the injuries received by accused no.1 on his hand, probably at the hands of the deceased.

16. Since we have held that the appellant had the requisite intention the offence would be punishable under Part I of Section 304 of IPC i.e. the culpable homicide not amounting to murder. Under Part I of Section 304 of IPC such offence is punishable with life imprisonment or imprisonment of either description for a term which may extend upto 10 years and shall also be liable to pay fine. The appellant seems to be in custody for a period of less than one

month before the trial and thereafter for a period of six months i.e. in all he has undergone imprisonment for a period of seven months. The complainant Rajesh has stated that at the relevant time the appellant was studying in 9th standard. The accused had claimed that he was aged 16 years though trial Court has gone by charge-sheet where his age was shown as 21 years. It seems that accused was below eighteen years when the offence was committed. There is no evidence produced on behalf of the accused to show that he was below 16 years of age. Prosecution has also not produced any evidence about the age of the accused though he was studying in school. Considering the young age of the accused it would not be desirable to impose the sentence of imprisonment of more than five years on the appellant.

17. In the result, the appeal is partly allowed and the order of conviction and sentence recorded by the 2nd Additional Sessions Judge, Satara in Sessions Case No. 50 of 1989 against the appellant for offence under Section 302 of IPC is set aside and instead the appellant is convicted for offence under Section 304 Part I of IPC and sentenced to R.I. for five years and to pay a fine of Rs.2000/-in default

to undergo further RI for six months. The appellant shall surrender within a period of four weeks from today.

(S.S.PARKAR,J.)

(S.R. SATHE,J.)